

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 94-295

In the Matter of)

Implementation of Section 309(j)
 of the Communications Act -
 Competitive Bidding)

PP Docket No. 93-253

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1994;

Released: November 17, 1994

By the Commission:

I. INTRODUCTION

1. By this action, we reconsider, on our own motion, decisions made in the *Fourth Memorandum Opinion and Order* in this proceeding, which addressed petitions for reconsideration of the *Fifth Report and Order* concerning auction design and procedures for the auction of licenses to provide personal communications services in the 2 GHz band ("broadband PCS").¹ In light of our experience in the national and regional narrowband PCS license auctions, we find it desirable to modify our rules pertaining to three aspects of auction design for the broadband PCS auctions: procedures triggering the close of an auction, timing of the auctions for the entrepreneurs' blocks, and anti-collusion rules.

II. STOPPING RULES

2. In the *Fifth Report and Order* we stated that a simultaneous multiple round auction with a simultaneous stopping rule will close when a single round has passed in which there is no new acceptable bid on any license and no activity rule waiver is submitted.² In the *Fourth Memorandum Opinion and Order* we allowed for two types of activity rule waivers, "proactive" waivers, which will keep an auction open in a round in which no new valid bids

¹ *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-264 (Rel. October 19, 1994) (*Fourth Memorandum Opinion and Order*); *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (Rel. July 15, 1994) (*Fifth Report and Order*).

² *Fifth Report and Order* at ¶¶ 46, 56.

are submitted, and "automatic" waivers, which will not keep an auction open.³ We also reaffirmed our decision to use a simultaneous stopping rule, which holds bidding open on all licenses until no new acceptable bid is offered on any license.⁴ These same rules were applied in the regional and national narrowband auctions. The nationwide narrowband PCS auction (with 10 licenses) was completed after 47 rounds of bidding, and the regional narrowband PCS auction (with 30 licenses) took 105 rounds to complete. In the broadband PCS auctions 99 MTA licenses will be auctioned in the first auction and a total of 1,972 BTA licenses in subsequent auctions. Although the number of rounds to complete a simultaneous multiple round auction is not necessarily directly proportional to the number of licenses put up for bid, we are concerned that, without changes in procedures, it may take an excessively long period of time to conduct these auctions, thus creating a significant delay in providing service to the public.⁵ Thus our recent experience with simultaneous multiple round auctions suggests that the Commission should consider additional measures to ensure that future auctions are completed within a reasonable period of time.

3. We believe that retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted will allow the Commission to complete the broadband PCS auctions in a timely manner without sacrificing efficiency or revenue. Providing the auction staff with the discretion to keep an auction open will permit the Commission to use larger minimum bid increments early in the auction (to move the auction along quickly) without incurring the risk that the auction will close while some bidders are willing to pay significantly more for certain licenses than the current high bid but not more than the relatively large minimum bid increments. The Commission will be able to permit additional bidding at lower bid increments subsequent to a round with no bids, thereby increasing the likelihood that licenses will be awarded to the bidders that value them most highly and facilitating efficient aggregations of licenses.

4. Retaining the discretion to keep an auction open will also allow the Commission to continue to accept bids on a license for which a bid was withdrawn late in an auction, especially in the last round of an auction. Without the option of keeping an auction open, a license for which a bid was withdrawn in the last round would have to be put up for bid in a subsequent auction.

5. Accordingly, we retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. Under this minor modification of our procedures, the Commission would in essence have the ability to submit its own proactive waiver, thus keeping the auction open. This rule modification will facilitate the rapid completion of future auctions because it will permit the Commission to use larger

³ *Fourth Memorandum Opinion and Order* at ¶ 15.

⁴ *Id.* at ¶ 16.

⁵ *Fifth Report and Order* at ¶ 50.

bid increments, which speed the pace of the auction, without risking a premature auction close.

III. TIMING OF AUCTIONS IN THE ENTREPRENEURS' BLOCKS

6. In the *Fifth Report and Order*, the Commission chose to divide broadband PCS licenses into three groups and to hold a simultaneous multiple round auction for the licenses in each group. The license group to be auctioned first consisted of blocks A and B, each with 30 MHz of spectrum and MTA geographic scope. The next group consisted of blocks C and F (the entrepreneurs' blocks), which have been reserved for bidding by smaller entrepreneurial firms. The group to be auctioned last consisted of blocks D and E, with 10 MHz of spectrum each and BTA geographic scope.⁶ We concluded that in order to promote efficient license allocation, highly interdependent licenses should be grouped together and put up for bid at the same time in a multiple round auction. Doing so, we concluded, would provide bidders information about the prices of complementary and substitutable licenses while such licenses were still up for bid, and thus would facilitate awarding licenses to the bidders who value them most highly. Nevertheless, we noted that the cost and complexity of auctioning a very large number of interdependent licenses simultaneously might outweigh the informational and bidding flexibility advantages.⁷ In the *Fourth Memorandum Opinion and Order* we reaffirmed our decision concerning the sequence of auctions.⁸

7. We now believe that we may wish to hold two separate auctions for the C and F block licenses.⁹ In light of our experience with the narrowband auctions, we are concerned that auctioning simultaneously the 986 licenses in the two entrepreneurs' blocks may create excessive administrative complexity for the Commission and for bidders, particularly when neither will have had experience with more than 99 licenses in a single auction. In addition, we have found that as we gain experience with license auctions we identify certain modifications that are necessary to improve the efficiency and administration of the auction process. We may wish to benefit from such experience in administering the highly complex designated entity provisions that apply to competitive bidding for licenses on the C and F blocks. Further, it appears now that few, if any, potential applicants have any interest in

⁶ *Id.* at ¶ 36.

⁷ *Id.*

⁸ *Fourth Memorandum Opinion and Order* at ¶ 29.

⁹ Potential bidders or their representatives have requested that the Commission auction the C and F blocks separately. See *ex parte* comments of the National Association of Black Owned Broadcasters, Inc., filed November 3, 1994 at 2; *ex parte* comments of North American Wireless, Inc., filed November 3, 1994 at 3-4; *ex parte* comments of National Association of Investment Companies, filed November 4, 1994 at 7.

aggregating block C and block F licenses, so that the interdependence between license values in the two blocks may be less than we initially believed. Consequently, we reserve the discretion to hold two separate simultaneous multiple round auctions for the entrepreneurs' block licenses, one auction for block C and one for block F. We will announce by Public Notice in advance of the application deadline whether one or two entrepreneurs' block auctions will be held and the date of those auctions.

IV. ANTI-COLLUSION RULES

8. We have become aware of some confusion regarding the definition of the terms "applicant" and "bidder" as they are used in our anti-collusion rules, and we wish to clarify our rules on this issue.¹⁰ Section 1.2105(c)(1) of the Commission's Rules prohibits "bidders" from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, but Section 1.2105(c)(2) and (3) provide exceptions to this rule so as to allow "applicants" to make changes in ownership that do not result in a change in control of the applicant, or to bid jointly with other applicants, as long as they have not applied for licenses in any of the same geographic license areas.¹¹ Though we intended the terms "bidder" and "applicant" to be used interchangeably, we now recognize that it would be less confusing simply to use the term "applicant," and we are amending the rules accordingly.

9. In addition, it has been suggested that Section 1.2105(c)(1) of our rules should be interpreted to mean that parties holding attributable interests in bidders are not prohibited from engaging in the discussions addressed in that section.¹² We wish to make clear that this interpretation is an incorrect reading of our rules. For purposes of our anti-collusion rules, therefore, we clarify that the term "applicant" will include all holders of attributable interests in an applicant. For this purpose, "attributable interest" shall have the same definition as that used in Section 24.204(d)(2)(i) of our Rules for purposes of defining interests subject to the spectrum aggregation limits: "[p]artnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS licensee or applicant will be attributable."¹³ In addition, "[o]fficers and directors of a broadband PCS licensee or applicant . . . shall be considered to

¹⁰ See November 4, 1994 letter from Kathy L. Shobert, Director, Federal Affairs, General Communication Incorporated, to William E. Kennard, FCC General Counsel.

¹¹ See 47 C.F.R. § 1.2105(c).

¹² See November 4, 1994 letter from James L. Lewis, Vice President, Regulatory Affairs, MCI Telecommunications Corporation to William E. Kennard, FCC General Counsel.

¹³ 47 C.F.R. § 24.204(d)(2)(i).

have an attributable interest in the entity with which they are so associated."¹⁴ This is entirely consistent with the intent of the anti-collusion rules. Indeed, if holders of attributable interests were not considered applicants, collusive arrangements would be possible simply through the creation of a separate entity to act as the "applicant." Further, this clarification conforms with other Commission rules regarding the competitive bidding process. For example, Section 24.813(a) requires parties applying to participate in broadband PCS auctions to provide, among other things, information with respect to "any person holding five percent or more of each class of stock, warrants, options or debt securities"¹⁵

10. We believe, however, that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants may enable applicants to acquire the capital necessary to bid successfully for licenses. Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process. In pursuit of that goal, however, we do not wish to restrict unreasonably the formation of non-collusive bidding consortia. For example, in the *Fourth Memorandum Opinion and Order*, we added to our Rules Section 24.833, which provides that parties that after the auction hold non-controlling ownership interests in more PCS spectrum than a single entity is entitled to hold may divest sufficient properties to come into compliance with the spectrum aggregation limits.¹⁶ Section 24.833 clearly contemplates entities holding ownership interests in two applicants for licenses in the same markets. Nevertheless, when one entity holds an attributable interest in more than one applicant for licenses in the same geographic license area, the potential for collusion is present because of the opportunity for the common owner to influence the bidding of the applicants. Thus, our rules permit applicants to change their ownership, enter into joint bidding arrangements and form consortia after the filing of short-form applications only if the parties to such arrangements have not applied for licenses in any of the same geographic areas.¹⁷

11. We believe that so long as collusive conduct can be reliably prevented, the public interest favors allowing holders of non-controlling attributable interests in one applicant for a particular license to obtain ownership interests in or enter into consortium arrangements with a second applicant for licenses in the same geographic area(s). Accordingly, we will amend the anti-collusion rules to permit a holder of non-controlling attributable interests in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the attributable interest holder certifies to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with

¹⁴ 47 C.F.R. § 24.204(d)(2)(vii).

¹⁵ 47 C.F.R. § 24.813(a)(3).

¹⁶ 47 C.F.R. § 24.833.

¹⁷ 47 C.F.R. § 1.2105(c)(2), (3).

which it has entered into a consortium arrangement. The attributable interest holder must certify that it has not communicated and will not communicate, with the applicant or anyone else, concerning the bids or bidding strategies (including which licenses an applicant will or will not bid on) of more than one applicant for licenses in the same geographic area in which it holds an ownership interest or with which it has a consortium arrangement. As described above, "applicant" for this purpose includes all holders of attributable interests in an applicant. Thus, if the attributable interest holder has discussed the bidding strategy of the applicant in which it holds an attributable interest (Company A), or of any other entity that also holds an attributable interest in Company A, the attributable interest holder may not acquire an attributable interest in another applicant for a license in a geographic area in which Company A (or any other attributable interest holder in Company A) has applied for a license unless it certifies that it has not communicated concerning the bids or bidding strategies of the applicant in which it wishes to acquire an attributable interest.

12. We believe that this revision will facilitate the flow of capital to applicants by enabling parties to make investments in multiple applicants for licenses in the same geographic license areas while ensuring that these investments will not lead to collusion among bidders. We recognize that some potential for collusion exists whenever an entity is permitted to hold an interest in more than one applicant for licenses in the same geographic license area. We expect that the certification requirement will adequately prevent collusion from occurring. However, we intend to scrutinize carefully any instances in which bidding patterns suggest that collusion may be occurring, and we wish to emphasize that all applicants and their owners continue to be subject to existing antitrust laws. Applicants should note that conduct that is permissible under the Commission's Rules may be prohibited by the antitrust laws.¹⁸ Thus, applicants should proceed with extreme caution in situations involving consortia and joint bidding arrangements. We also wish to make clear that communications concerning bids and bidding strategies may include communications regarding capital calls or requests for additional funds in support of bids or bidding strategies to the extent such communications convey information concerning the bids and bidding strategies directly or indirectly. If applicants enter into new or modified consortia or bidding arrangements, or if changes are made in an applicant's ownership, the applicants must timely modify their short-form applications to reflect these changes.

V. ORDERING CLAUSES

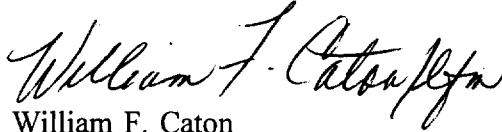
13. Accordingly, IT IS ORDERED that Part 1 of the Commission's Rules IS AMENDED as set forth in the attached Appendix.

14. IT IS FURTHER ORDERED that the rule amendments made herein WILL BECOME EFFECTIVE immediately upon publication in the Federal Register. This action is

¹⁸ See *Fourth Memorandum Opinion and Order* at n.125.

taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).¹⁹

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "William F. Caton".

William F. Caton
Acting Secretary

¹⁹ Pursuant to 5 U.S.C. § 553(d)(3), we conclude that "good cause" exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to finalize their bidding strategies and business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns that last-minute modifications to our Rules would impede the success of their auction plan. *See* 5 U.S.C. § 553(d)(1).

APPENDIX
FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 1, 4(i), 303, 309(j), 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 151, 154, and 303, unless otherwise noted.

2. The authority citation for subpart Q continues to read as follows:

AUTHORITY: 47 U.S.C. 309(j).

3. Section 1.2105(c) is amended to read as follows:

(c) **Prohibition of Collusion.**

(1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this subsection, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are member of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Section 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) the arrangements do not result in any change in control of an applicant.

Applicants must modify their short-form applications to reflect any changes in ownership or in the membership of consortia or joint bidding arrangements.

(5) For purposes of this subsection,

(i) the term "applicant" shall include the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) the term "bids or bidding strategies" shall include capital calls or requests for additional funds in support of bids or bidding strategies.

EXAMPLE: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.